

**STATE OF TENNESSEE**

OFFICE OF THE  
ATTORNEY GENERAL  
PO BOX 20207  
NASHVILLE, TENNESSEE 37202

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Opinion No. 04-114

Sale of Register of Deeds Records to Vendor for Resale to Public by Subscription

**QUESTIONS**

Several registers of deeds have entered into agreements with private vendors for the off-site storage of the information recorded in their offices. Vendors periodically upload to their servers a copy of the data stored on the computers in the register of deeds' offices. Vendors then sell subscriptions to the public for access to this information.

1. Is a county authorized to enter into an agreement with a vendor in which the county provides copies of public records to the vendor in exchange for services?

2. Is a county authorized to enter into an agreement with a vendor in which the vendor will profit from selling or providing access to copies of public records that the county has given to the vendor in exchange for services?

3. May a vendor who has obtained copies of public records from a county offer access to these public records to anyone for a fee and impose certain restrictions on the buyer such as limiting the use of information for personal and non-commercial purposes, and prohibiting the modification, copying, distribution, transmittal, display, transfer, or sale of such information?

**OPINIONS**

All of the arrangements specifically described in the request violate Tenn. Code Ann. § 10-7-123, which requires an official to provide remote electronic access to all members of the public for a uniform fee. But a private party who obtains public records by remote electronic access or otherwise pursuant to the Public Records Act is free, having obtained the records, to sell access to them subject to any terms and conditions the private party is able to negotiate with purchasers.

**ANALYSIS**

This opinion concerns the authority of a county register of deeds to contract with private vendors regarding the records of the register's office. Any definitive answer to this question, of course, would require a review of the particular contractual arrangement. This Office has addressed the general authority of a county official to enter into a business venture with a private entity to sell public records. Op. Tenn. Att'y Gen. 00-101 (May 24, 2000). That opinion notes that any contract

for the sale or storage of public records would have to be consistent with the county's statutory duty to provide public access to public records and that, absent express statutory authority, counties are not authorized to enter into contracts for the sale of public records.

Under Tenn. Code Ann. §§ 10-7-503, *et seq.* (the "Public Records Act"), public records must "at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law." Tenn. Code Ann. § 10-7-503(a). The governmental custodian of the public records may charge the requesting individual the cost of disclosing a public record in a specific format if it does not have the record in that format. *The Tennessean v. Electric Power Board of Nashville*, 979 S.W.2d 297 (Tenn. 1998). In addition, a public agency may charge the actual costs of providing a copy of a record. Under Tenn. Code Ann. § 10-7-506(a):

In all cases where any person has the right to inspect any such public records, such person shall have the right to take extracts or make copies thereof, and to make photographs or photostats of the same while such records are in the possession, custody and control of the lawful custodian thereof or such custodian's authorized deputy; provided, that the lawful custodian of such records shall have the right to adopt and enforce reasonable rules governing the making of such extracts, copies, photographs or photostats.

Tenn. Code Ann. § 10-7-506(a). This Office has stated in the past that, ordinarily, a county may not charge more than the actual cost of copying the record, including the cost to provide the copy in the format requested. Op. Tenn. Att'y Gen. 02-065 (May 17, 2002). *See also J.D.Hickman v. Tennessee Board of Probation and Parole*, M2001-02346-COA-R3-CV, 2003 WL 724474, slip op. (M.S. Tenn. Ct. App. March 4, 2003) (a state agency could require a requestor to pay in advance the cost of producing or delivering a copy of requested records, including the costs of a special computer run needed to retrieve the information in the format requested).

In addition, under Tenn. Code Ann. § 10-7-506(c), with regard to a map or geographical information with commercial value, a state or local government agency may charge a copying fee that includes part of the cost of developing the data. The statute provides in relevant part:

(c)(1) If a request is made for a copy of a public record that has commercial value, and such request requires the reproduction of all or a portion of a computer generated map or other similar geographic data that was developed with public funds, a state department or agency or a political subdivision of the state having primary responsibility for the data or system may establish and impose reasonable fees for the reproduction of such record, in addition to any fees or charges that may lawfully be imposed pursuant to this section. The additional fees authorized by this subsection may not be assessed

against individuals who request copies of records for themselves or when the record requested does not have commercial value. State departments and agencies and political subdivisions of the state may charge a reasonable fee (cost of reproduction only) for information requested by the news media for news gathering purposes (broadcast or publication).

(2) The additional fees authorized by this subsection shall relate to the actual development costs of such maps or geographic data and may include:

(A) Labor costs;

(B) Costs incurred in design, development, testing, implementation and training; and

(C) Costs necessary to ensure that the map or data is accurate, complete and current, including the cost of adding to, updating, modifying and deleting information.

(3) The development cost recovery set forth above shall be limited to not more than ten percent (10%) of the total development costs unless additional development cost recovery between ten percent (10%) and twenty percent (20%) is approved by the following procedures: . . . For political subdivisions of the state, approval for additional development cost recovery as contained in a proposed business plan must be obtained from the governing legislative body. If the governing legislative body approves additional development cost recovery, such recovery shall be submitted to the ISC [Information Systems Council] for approval. The development costs of any system being recovered with fees authorized by this section shall be subject to audit by the comptroller of the treasury, it being the legislative intent that once such additional fees have paid the portion of the development costs authorized above, such fees shall be adjusted to generate only the amount necessary to maintain the data and ensure that it is accurate, complete and current for the life of the particular system. Notwithstanding the limitations above, the recovery of maintenance costs shall not be subject to the limitations and procedures provided above for the recovery of development costs.

Code Ann. § 10-7-403(1). The system of maintaining computer records must also comply with Tenn. Code Ann. § 10-7-121. Under this provision, generally, information required to be kept as a record by a government official may be maintained on a computer instead of in bound books or paper records if the information is available for public inspection; care is taken to maintain the information during the time required by law for retention; data is copied to computer storage media daily, and computer storage media more than one week old is stored at a location other than at the building where the original is maintained; and the official can provide a paper copy of the information when needed or when requested by a member of the public.

Under Tenn. Code Ann. § 10-7-123, a county official may, at his or her discretion, provide computer access and remote electronic access to information in the office records. The official may charge users of information an amount sufficient to recover the costs of providing the services and for no other access services. Tenn. Code Ann. § 10-7-123(a)(1). The fee must be uniformly applied. *Id.* Once a remote electronic access system is in place, access must be given to all members of the public who desire access to the records and pay the applicable reasonable fees, including those who may use such information for proprietary purposes. Tenn. Code Ann. § 10-7-123(a)(4).

The first question is whether a county is authorized to enter into an agreement with a vendor in which the county provides copies of public records to the vendor in exchange for services. Counties are creatures of statutes and have only such powers as are expressly conferred by the legislature or necessarily implied from such grants of power. *Metropolitan Government of Nashville and Davidson County v. Allen*, 220 Tenn. 222, 225, 415 S.W.2d 632 (1967); *Bayless v. Knox County*, 199 Tenn. 268, 281, 286 S.W.2d 579 (1955); *Hicks v. Fox*, 190 Tenn. 82, 86, 228 S.W.2d 68 (1950); *State ex rel. Citizens of Wilson County v. Lebanon & Nashville Turnpike Co.*, 151 Tenn. 150, 160, 268 S.W. 627 (1924). None of the relevant statutes discussed above concerning the amounts public officials may charge in connection with providing access to, and/or copies of, public records, authorizes counties or county officials to accept services in exchange for such access. Moreover, any fee charged for remote electronic access to computerized public records, “shall be uniformly applied.” Tenn. Code Ann. § 10-7-123(a)(1). The statute does not define the term “remote electronic access.” Under the described arrangement, the county register apparently allows a single private company to obtain, by computer, electronic copies of documents kept in the register’s office. Depending on the facts and circumstances of the arrangement, we think a court would conclude that the county has, in effect, provided “computer access and remote electronic access for inquiry only” to a single private company in exchange for the company’s record-keeping services. These terms are not available to other members of the public. For this reason, we think this arrangement violates Tenn. Code Ann. § 10-7-123, which requires an official to provide remote electronic access to all members of the public for a uniform fee.

## 2. County Agreements under Which Vendor Will Profit from Providing Access to Public Records

Question 2 concerns the legality of an “Internet Service Agreement” between a county and a private company. Under the agreement, the company agrees to provide Internet access to the

county's land records, allowing online searching of indexes and imaged documents retrieved as they are recorded daily by the county register's office. County officials have free Internet access to the records. The private company obtains "unlimited usage" of the county's records. In return, the company provides a copy of the records to the county in CD form as a backup and maintains an off site backup of the records updated about every thirty minutes. Apparently, the private company then charges other members of the public a fee to access the records on the Internet.

Under Tenn. Code Ann. § 10-7-123, a county official must charge a uniform fee to users of information provided through remote electronic access. Once a remote electronic access information system is in place, access must be given to all members of the public who desire access to such records, and pay applicable reasonable fees as defined in this section, including those who may use such information for proprietary purposes. Again, for the reasons discussed above, we think a court would conclude that the county has, in effect, provided "computer access and remote electronic access for inquiry only" to a single private company in exchange for the company's record-keeping services. These terms are not available to other members of the public. For this reason, we think this arrangement violates Tenn. Code Ann. § 10-7-123, which requires an official to provide remote electronic access to all members of the public for a uniform fee.

### 3. Private Use of Copies of Public Records

Question 3 concerns the legality of an arrangement where there is apparently no written agreement between the county and the private company. The company provides online access to records for the county to members of the public for a fee. Terms of the agreement with customers include a clause disclaiming any liability if the records are inaccurate.

As discussed above, any contract for the sale or storage of public records must be consistent with the county's statutory duty to provide public access to public records. Again, as described, the county is providing some form of online or computer access to a private company. The company pays no fee for the service. The county does not provide the same access to other members of the public on the same terms. For this reason, we think this arrangement also violates Tenn. Code Ann. § 10-7-123, which requires an official to provide remote electronic access to all members of the public for a uniform fee.

The county's authority to provide documents must be distinguished, however, from the right of a private party to use public documents obtained from the county. A county must provide all members of the public with copies of public records in the same form and at the same price. But once a member of the public obtains a copy of a record, the public agency that provided the record is not authorized to place conditions on how the member of the public may use the record. Thus, a private party who obtains public records by remote electronic access or otherwise pursuant to the Public Records Act is free, having obtained the records, to sell access to them subject to any terms

and conditions the private party is able to negotiate with purchasers.

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PAUL G. SUMMERS  
Attorney General

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MICHAEL E. MOORE  
Solicitor General

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ANN LOUISE VIX  
Senior Counsel

Requested by:

Honorable John G. Morgan  
Comptroller of the Treasury  
State Capitol  
Nashville, TN 37243-0260